

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

NOV 29 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

OSCAR JACQUES ORTIZ, JR.,

Appellant.

2 CA-CR 2006-0335

DEPARTMENT B

MEMORANDUM DECISION

Not for Publication

Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20060226

Honorable Howard Hantman, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Diane Leigh Hunt

Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Stephan J. McCaffery

Tucson
Attorneys for Appellant

E S P I N O S A, Judge.

¶1 Appellant, Oscar Ortiz, Jr., was convicted after a jury trial of one count of aggravated driving under the influence of an intoxicant while his license was suspended, revoked, or in violation of a restriction, a class four felony, and one count of aggravated

driving with a blood alcohol concentration (BAC) of .08 or more while his license was suspended, revoked, or in violation of a restriction, a class four felony. The trial court imposed concurrent, enhanced presumptive ten-year prison terms on both counts based on the existence of two historical prior felony convictions. On appeal, Ortiz challenges the legality of the sentences imposed by the trial court, contending it committed fundamental error by failing to conduct a trial on two prior convictions that Ortiz admitted during his testimony. Because one of the priors was not sufficiently proven for purposes of enhancement under A.R.S. § 13-604(W), we remand the case for re-sentencing.

Facts

¶2 At trial, Ortiz testified he had previously plead guilty to one count each of solicitation to unlawfully possess cocaine and possession of narcotic paraphernalia in 2004 and attempt to unlawfully possess cocaine and possession of drug paraphernalia in 2005. Ortiz provided the case number and date of conviction for each offense, but did not provide the dates on which he had committed them. Outside the presence of the jury, the prosecutor asked the trial court to accept the two prior convictions Ortiz had admitted as proven. The judge replied “[o]kay.”¹ At sentencing, the court noted the convictions in enhancing Ortiz’s sentences as set out above.

¹The trial court later reconvened the jury to hear evidence on Ortiz’s 1996 conviction for possession of a prohibited weapon for the purpose of sentence aggravation, which the jury found proven.

Discussion

¶3 Because Ortiz failed to raise his current objections at sentencing, we review his claims only for fundamental error, which he bears the burden of establishing. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005); *State v. Joyner*, 215 Ariz. 134, ¶ 5, 158 P.3d 263, 266 (App. 2007); *State v. Munninger*, 213 Ariz. 393, ¶ 4, 142 P.3d 701, 703 (App. 2006). To merit relief, a defendant must establish “both that fundamental error exists and that the error in his case caused him prejudice.” *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. Division One of this court has held that “[i]mposition of an illegal sentence constitutes fundamental error.” *State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002); *see also Joyner*, 215 Ariz. 561, ¶ 5, 158 P.3d at 266; *State v. Cox*, 201 Ariz. 464, ¶ 13, 37 P.3d 437, 441 (App. 2002). A sentence is illegal where the trial court fails to impose it “in conformity with mandatory sentencing statutes.” *Joyner*, 215 Ariz. 561, ¶ 5, 158 P.3d at 266, *quoting Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d at 369.

¶4 Ortiz claims the trial court improperly enhanced his sentences because his 2004 and 2005 convictions were not established as “historical prior felony convictions” under A.R.S. § 13-604(W). As a result, Ortiz asserts that he is “entitled to be sentenced as a first-time offender.” We review *de novo* the question whether the trial court correctly applied the sentencing statute. *State v. Hollenback*, 212 Ariz. 12, ¶ 12, 126 P.3d 159, 163 (App. 2005); *State v. Virgo*, 190 Ariz. 349, 352, 947 P.2d 923, 926 (App. 1997). Section 13-604(W)(2), A.R.S., defines a “historical prior felony conviction” as, *inter alia*:

(c) Any class 4, 5 or 6 felony, except the offenses listed in subdivision (a) of this paragraph, that was committed within the

five years immediately preceding the date of the present offense. Any time spent on absconder status while on probation or incarcerated is excluded in calculating if the offense was committed within the preceding five years. . . .

(d) Any felony conviction that is a third or more prior felony conviction.

¶5 Ortiz concedes that the criminal procedure rules permit the use of his admissions to prove prior felony convictions. *See* Ariz. R. Crim. P. 17.6. Indeed, it is well established that a defendant’s “admission of a prior conviction elicited during [trial is] conclusive on the issue of prior conviction and no further hearing [is] necessary.” *State v. Thomas*, 109 Ariz. 399, 401, 510 P.2d 45, 47 (1973); *State v. Whitney*, 159 Ariz. 476, 485, 768 P.2d 638, 647 (1989) (finding “[i]t will suffice if the defendant admits the prior convictions during his testimony at trial”); *State v. Pacheco*, 121 Ariz. 88, 90, 588 P.2d 830, 832 (1978) (same); *see also State v. Seymour*, 101 Ariz. 498, 500, 421 P.2d 517, 519 (1966). Rule 19.1(b), Ariz. R. Crim. P., “formalizes this existing practice of Arizona courts.” Ariz. R. Crim. P. 19.1(b), cmt. (recognizing that “a defendant’s admission on the stand of a prior conviction was sufficient proof of it”).

¶6 Focusing, however, on the definition provided in A.R.S. § 13-604(W)(2)(c), Ortiz argues that his admissions during trial “were legally insufficient to establish the predicates needed to show the prior convictions were historical prior convictions as defined in A.R.S. §13-604(W),” because there was no information regarding “when the offenses occurred and how much time, if any, Ortiz had spent incarcerated since their commission.” And, he asserts, because the trial court failed to conduct a bench trial or otherwise ascertain

the dates of the offenses, it could not rely on the 2004 and 2005 convictions as historical prior convictions for sentence enhancement purposes.

¶7 We agree that, notwithstanding Ortiz’s admissions, his 2004 conviction did not qualify as an historical prior felony under § 13-604(W). Although “pen pak” documents were admitted at trial, they contain no information regarding when Ortiz committed the 2004 felony offense and that question does not appear to be answered anywhere in the record before us.² Thus, the 2004 conviction does not, on this record, qualify as an historical prior and the court improperly relied on it to enhance Ortiz’s sentence with two prior historical felony convictions when only one had been established. Accordingly, the concurrent, enhanced presumptive ten-year prison terms the trial court imposed are not “in conformity with mandatory sentencing statutes.” *Joyner*, 215 Ariz. 134, ¶ 5, 158 P.3d at 266, *quoting State v. Carbajal*, 184 Ariz. 117, 118, 907 P.2d 503, 504 (App. 1995); *see* A.R.S. § 13-604(A) and (C).

¶8 Further analysis is required, however, because a defendant must also establish that the unobjected-to error was prejudicial. *See Henderson*, 210 Ariz. 561, ¶ 27, 115 P.3d 601, 609. Section 13-604(C), A.R.S., prescribes a ten-year prison term for persons where a defendant who stands convicted of a class four felony “has two or more historical prior felonies.” In contrast, a defendant convicted of a class four felony with only one historical prior felony, faces a presumptive term of 4.5 years under A.R.S. § 13-604(A).

²The “pen pak” admitted at trial only contained information regarding Ortiz’s 1996 conviction.

¶9 The state argues that, as alleged in Ortiz’s indictment, in the event any of his prior felony convictions do not constitute “historical prior felony convictions,” as defined in A.R.S. § 13-604, “such convictions will enhance the defendant’s sentence pursuant to . . . 13-702.02 and *Ariz[ona] ex rel. Romley v. Hauser*, 209 Ariz. 539, [¶ 4,] 105 P.3d 1158, [1159] (2005).”³ Section 13-702.02 specifies that the presumptive term for a class four felony is 4.5 years’ imprisonment, and the maximum term is six years of imprisonment “[f]or any nondangerous felony offense subsequent to the second felony offense.” Section 13-702.02(D) states that “the court may increase the maximum sentence otherwise authorized by up to twenty-five percent.” Thus, even considering the other prior felony convictions as aggravating factors, the maximum term the court could have imposed against Ortiz under §13-702.02 was 7.5 years of imprisonment.⁴ The sentencing error was therefore prejudicial to Ortiz under either § 13-604 or § 13-702.02.

¶10 Ortiz’s assertion that he is “entitled to be sentenced as a first-time offender,” however, is incorrect because it was established that his most recent conviction qualifies as an historical prior felony conviction. The record reflects Ortiz has three prior felony convictions. His 1996 conviction for possession of a prohibited weapon was established before the jury following his trial. *See State v. Hunter*, 137 Ariz. 234, 238, 669 P.2d 1011,

³*Romley* determined “a prior felony conviction that falls outside the definition of a[n] ‘historical prior felony conviction’ in A.R.S. § 13-604[(W)] may nonetheless be used for sentence enhancement under A.R.S. § 13-702.02.” 209 Ariz. 539, ¶ 4, 105 P.3d at 1159.

⁴The state also alleged Ortiz’s sentences might be enhanced under A.R.S. § 13-3419, but has not raised that argument on appeal and we do not address it. *See State v. Kemp*, 185 Ariz. 52, 57, 912 P.2d 1281, 1286 (1996); Ariz. R. Crim. P. 31.13(c).

1015 (App. 1983) (finding “the prior conviction must either be admitted by the defendant or found to be true by the trier of fact”). And Ortiz admitted at trial that he previously had been convicted of two felony convictions—solicitation to unlawfully possess cocaine in 2004 and attempt to unlawfully possess cocaine in 2005. Thus, the latter conviction, as Ortiz’s third, qualifies as an “historical prior felony conviction” under § 13-604(W)(2)(d) regardless of the date of that offense, and he was not entitled to be sentenced as a first-time offender.

Disposition

¶11 The trial court committed fundamental error in imposing enhanced, presumptive terms of imprisonment based on two historical prior felony convictions where the state had proved the existence of only one. The error was both fundamental and prejudicial, given that the terms of imprisonment imposed exceed the parameters of the applicable sentencing statutes. Accordingly, we affirm the convictions but vacate the sentences and remand this matter to the trial court for re-sentencing in accordance with this decision.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge